

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma, et al.,)	Case No. 4:05-cv-00329-GKF-PJC
)	
Plaintiffs,)	
)	
vs.)	DEFENDANTS’ RESPONSE IN
)	OPPOSITION TO PLAINTIFFS’
Tyson Foods, Inc., et al.,)	“MOTION IN LIMINE PERTAINING
)	TO DEFENDANTS’ ARGUMENTS
Defendants.)	SUGGESTING THAT THE STATE
)	MUST PROVE ITS CASE THROUGH
)	DIRECT EVIDENCE” (DKT. NO. 2423)
)	

Defendants jointly oppose Plaintiffs’ motion in limine at Docket No. 2423 requesting that this Court preclude all argument, questioning, and evidence “which suggests that the State must prove its case through direct evidence” as inadmissible under Federal Rule of Evidence 402. The Court should reject Plaintiffs’ motion in limine because it improperly seeks to prevent purely legal arguments concerning highly relevant underlying facts.

As a threshold matter, Defendants have not argued and do not argue now that “the State **must** prove its case through direct evidence,” which is the facial basis for Plaintiffs’ motion. (Dkt. No. 2423 at 1, 3.) Obviously, a plaintiff may prove its claims through sufficient circumstantial evidence. E.g., Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003) (racial discrimination case cited by Plaintiffs at Dkt. No. 2423 at 2). Here, Plaintiffs are masters of their claims and may choose to proceed to trial without any direct evidence of Defendants’ conduct if they wish. Indeed, Plaintiffs have all but admitted that they have no such direct evidence. (See, e.g., Ex. A: Kleibacker Lee Decl. quoting A.G. Edmondson Feb. 5, 2009 Public Radio Tulsa interview: “No, we cannot say that it [waste] comes from a particular house.”; Dkt. No. 1933-12 at 39 & 44; Pls.’ Resps. to Cargill Interrogs. 9 & 13: “At this time, the State has not identified

direct evidence of a violation of the applicable statutes or regulations by either of the Cargill entities.” “At this time, the State has not identified direct evidence of an action constituting a nuisance by either of the Cargill entities.”)

Regardless the form of the evidence, however, Plaintiffs must provide at trial adequate proof of a causal relationship between each individual Defendant’s alleged conduct and Plaintiffs’ alleged injury. E.g., Angell v. Polaris Prod. Corp., 280 Fed. Appx. 748, 752 (10th Cir. 2008) (upholding dismissal of public nuisance claim due to plaintiff’s failure to prove causation by showing that defendant, as opposed to other co-defendants or other sources, caused contamination at issue); see also, e.g., Defs.’ Mot. Partial Summ. J. Due to Lack of Def.-Specific Causation at 16-18: Dkt. No. 2069).

Moreover, although Plaintiffs’ motion talks about excluding “evidence which suggests that the State must prove its case by direct evidence” and cites Rules of Evidence 401 and 402 and related cases (see Dkt. 2423 at 1-2), Plaintiffs never describe what type of evidence might “suggest” such a conclusion and fail to identify a single example of such evidence. If Plaintiffs themselves cannot identify the evidence they ask the Court to exclude, the Court cannot as a practical matter grant any relief, and can reasonably surmise that the real purpose of the motion cannot be to exclude such evidence.

In fact, the true purpose of Plaintiffs’ motion in limine seems to be to try to prevent Defendants from critiquing or criticizing at trial the meager weight, and in some instances the complete lack, of the State’s circumstantial evidence against them, and from arguing that the abundance of direct evidence in Defendants’ favor should carry the day. (See, e.g., Defs.’ Summ. J. Brs. at Dkt. Nos. 2069, 2079, 2259, 2265 (all arguing that Plaintiffs have not identified sufficient Defendant-specific causation evidence for their claims to proceed to trial and that

Defendants have proven the negative – an absence of evidence – through direct evidence).) To bar Defendants from countering Plaintiffs’ allegations at trial with a fair critique of the probative value of the evidence proffered against them would be wholly improper. See, e.g., United States v. Tan, 254 F.3d 1204, 1208-09 (10th Cir. 2001) (reversing trial court’s exclusion of highly relevant evidence that tended to prove material facts).

Indeed, such a ruling would introduce error into the trial record by severely prejudicing Defendants. See, e.g., Owner-Operator Indep. Drivers Ass’n v. USIS Commer. Serv., 537 F.3d 1184, 1193 (10th Cir. 2008) (describing abuse of discretion standards).

CONCLUSION

For all of these reasons, the Court should deny Plaintiffs’ motion in limine at Dkt. No. 2423 “Pertaining to Defendants’ Arguments Suggesting that the State Must Prove Its Case Through Direct Evidence.”

Date: August 20, 2009

Respectfully submitted,

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